

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 62/05

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.**

SAMUEL MELBOURNE v R

Applicant unrepresented

Miss Joan Barnett for the Crown

January 31, 2007

ORAL JUDGMENT

SMITH, J.A:

The applicant Samuel Melbourne was convicted in the St. James Circuit Court on the 8 April 2005 for the offences of carnal abuse and buggery. He was sentenced to 10 years imprisonment at hard labour in respect of both counts. His application for leave went before the single judge on the 5 October 2006 and it was refused. He has now renewed his application for leave before this Court. We have gone through the evidence with learned crown counsel and have examined the summing up. I will only repeat a part of the evidence.

On the 1 December 2003, a young girl, 11 years old, went on an errand for her grandmother. While she was returning home she saw the applicant who was by an old car on the roadway. The applicant invited her to come to him when she was through. She handed what she had in her hand to her little brother and went with the applicant. The applicant took her to a hut where he told her to take off her clothes, which she did, and he proceeded to have sex with her and subsequently he buggered her.

The grandmother, not seeing her little one, went in search of her. Her search took her to the hut, where according to the grandmother, she saw them, the applicant and the little girl, naked. The matter was reported to the police. The applicant was arrested and charged. The little girl went to the doctor. The doctor found evidence of recent sexual intercourse and also evidence that her anus was penetrated. In December 2003, when the applicant was confronted with the charges he made a statement, when cautioned, to the effect that "more men a do it to her and that he had warned her" and so on. At his trial his defence was a denial. He pleaded impotence. The jury convicted him on both counts.

We have examined the learned judge's summing-up and directions to the jury. She dealt with all the issues that she was required to deal with, corroboration being the chief one. She outlined the evidence

that the Crown relied on and of course the defendant's defence and left it to the jury as the judges of fact to return a verdict.

We can find no flaw in the judge's summing up. It was fair and adequate. Accordingly, the application for leave to appeal against conviction is refused. As regards the sentence, we notice that the judge imposed a sentence of 10 years. That is the maximum. The applicant had no previous convictions. Although in the face of the clear evidence he sought to fight the case. This is his first conviction and the maximum sentence could be described as manifestly excessive in all the circumstances. The judge clearly intended to punish him equally in respect of both counts. We will not veer from that principle clearly enunciated by the judge. We are of the view that a term of 7 years would be appropriate in all the circumstances.

We have treated the hearing of the application for leave to appeal against sentence as the hearing of the appeal against sentence. We have allowed the appeal against sentence, the sentence of 10 years is set aside and we substitute therefor a sentence of 7 years imprisonment on each count. The sentences are to run from the date of conviction.